

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

74-2168

B
P/S

To be argued by
EDWARD R. ZUCCARO

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2168

THE VERMONT NATURAL RESOURCES COUNCIL, INC.; CATHERINE BEATTIE, individually and as a member of the VERMONT NATURAL RESOURCES COUNCIL, INC.; CITIZENS ASKING FOR RECONSIDERATION OF ROUTE 2; and LESLIE A. PARKER, individually and as a member of CITIZENS ASKING FOR RECONSIDERATION OF ROUTE 2,

Plaintiffs-Appellants,

v.

CLAUDE S. BRINEGAR, Secretary of Transportation, DAVID B. KELLEY, Division Engineer, Federal Highway Administration; H. JAMES WALLACE, FRANK S. BALCH, HENRY O. ANGELL, ROBERT S. BIGELOW and WILLIAM COSTA, in their capacities as members of THE VERMONT STATE HIGHWAY BOARD; and JOHN T. GRAY, Commissioner of Highways, State of Vermont,

Defendants-Appellees,

TOWN OF ST. JOHNSBURY,

Defendant-Intervenor-Appellee.

On Appeal From The United States District Court
For The District Of Vermont

BRIEF FOR INTERVENOR-APPELLEE

WITTERS, ZUCCARO, WILLIS & LIUM
Attorneys for Intervenor-Appellee
101 Eastern Avenue
St. Johnsbury, Vermont
Tel. 802-748-8958

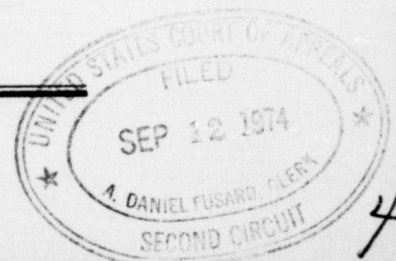


TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities-----	ii.
Statutes-----	iii.
Statement of Issues-----	1
Statement of the Case-----	2
Argument:	
Point I - The environmental impact statement prepared by the Vermont Highway Department with direction, guidance and assistance and daily communication with the Federal Highway Administration which was then reviewed, revised and adopted by the Federal Highway Administration complies with Section 102 (2) (C) of the National Environmental Policy Act of 1969, 42 U. S. C. §4332 (2) (C)-----	7
Point II - The Sleepers River is not a navigable water within the meaning of 33 U. S. C. Section 1362 (7)-----	10
Point III - The granting of an injunction prohibiting construction of the Sleepers River interchange and of the interstate in the area of the Sleepers River will cause serious harm and inconvenience to the Town of St. Johnsbury and to the general public----	11
Conclusion-----	15

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page</u>
Aberdeen & Rockfish Railroad Co. et al., Applicants v. Students Challenging Regulatory Agency Procedures (SCRAP) et al.	12
Citizens Environmental Council v. Volpe, 484 F. 2d 870 (10th Cir. 1973)	8
Finish Allatoona's Interstate Right, Inc. v. Volpe, 484 F. 2d, 638 (5th Cir. 1973)	8
Greene County Planning Board v. F. P. C. 455 F. 2d 412 (2d Cir.) Cert. denied, 409 U. S. 849 (1972)	8
Hecht Company v. Chester Bowles 321 U. S. 321 88 L Ed. 754 (1943)	13
Hecht v. Bowles (supra) 56 STAT 23, C26, 50 USCA Appx. Section 901, 925 11 FCA Title 50, Appx. 25 Section 201,205	13
Interstate Commerce Commission v. Students Challenging Regulatory Agency Procedures (SCRAP) et al. 409 U. S. 1207, 34 L Ed. 2d 21, 93 S. Ct. 1 (1972)	12
Iowa Citizens For Environmental Quality, Inc. v. Volpe, supra	8
Life Of The Land v. Brinegar, 485 F. 2d 460 (9th Cir. 1973)	8
Movement Against Destruction v. Volpe F. 2d, (4th Cir. March 19, 1974)	8
Rochester Gas & Electric Corporation v. Federal Power Commission, 344 F. 2d 594, 596 (2d. Cir.) Cert. denied 382 U. S. 832 (1965)	11

Statutes:

Page

Emergency Price Control Act

56 STAT 23, C 26, 50

USCA Appx. Section 901, 925, 11

FCA Title 50, Appx. 25, Section 201, 205

13

Federal Water Pollution Control

Act Amendments of 1972

33 U. S. C. Sections 1362 (7)

1311; 1344; 407 and 403

2, 10

33 U. S. C. Sections 1301, 1444

10

National Environmental Policy Act
of 1969, 42 U. S. C. §4332 (2) (C)

1, 2, 7, 15

WITTERS, ZUCCARO

AND WILLIS

ATTORNEYS AT LAW

ST. JOHNSBURY, VERMONT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 74-2168

THE VERMONT NATURAL RESOURCES COUNCIL, INC., CATHERINE BEATTIE,
Individually and as a member of the VERMONT NATURAL RESOURCES
COUNCIL, INC., CITIZENS ASKING FOR RECONSIDERATION OF ROUTE 2;
and LESLIE A. PARKER, Individually and as a member of CITIZENS
ASKING FOR RECONSIDERATION OF ROUTE 2,

Plaintiffs - Appellants

v.

CLAUDE S. BRINEGAR, Secretary of Transportation, DAVID B. KELLEY,
Division Engineer, Federal Highway Administration; H. JAMES
WALLACE, FRANK S. BALCH, HENRY O. ANGELL, ROBERT S. BIGELOW and
WILLIAM COSTA, in their capacities as members of THE VERMONT
STATE HIGHWAY BOARD; and JOHN T. GRAY, Commissioner of Highways,
State of Vermont,

Defendants - Appellees,

TOWN OF ST. JOHNSBURY

Defendant - Intervenor
Appellee

On Appeal From the United States District Court
For The District of Vermont

STATEMENT OF ISSUES

- I. Whether an environmental impact statement prepared by the Vermont Highway Department under the direction, guidance and instructions of the Federal Highway Administration and subsequently reviewed, revised and adopted by the Federal Highway Administration constitutes a "detailed statement by the responsible official" as required by Section 102 (2) (C) of the National Environmental Policy Act of 1969, 42 U.S.C. Section 4332 (2) (C).

- II. Whether the Sleepers River is a navigable water within the meaning of 33 U. S. C. Section 1362 (7).
- III. Whether the Plaintiffs - Appellants are entitled to equitable relief when the granting of such relief will result in substantial harm, injury and inconvenience to other parties and to the general public.

STATEMENT OF THE CASE

The complaint in this case was filed on June 17, 1974, by the Plaintiffs, the Vermont Natural Resources Council, Inc.; Catherine Beattie, individually and as a member of the Vermont Natural Resources Council, Inc.; Citizens Asking For Reconsideration of Route 2; and Leslie A. Parker, individually and as a member of Citizens Asking For Reconsideration of Route 2. The complaint sought to enjoin construction of three highway projects in the St. Johnsbury, Vermont area on the grounds that the environmental impact statement ("EIS") had not been prepared by the "responsible official" under Section 102 (2) (C) of the National Environmental Policy Act of 1969, 42 U. S. C. Section 4332 (2) (C). Additionally, it was claimed that the EIS was deficient in that it failed to consider alternatives to the location of the Sleepers River interchange and a 4.3 mile section of relocated U. S. Route 2. Plaintiffs further claimed that Defendants - Appellants were in violation of the Federal Water Pollution Control Act Amendments of 1972, 33 U. S. C. Sections 1362 (7); 1311; 1344; 407; and 403.

Simultaneously with the filing of the complaint, a motion for a temporary restraining order was also filed with the Court. On both June 17, and June 21, 1974, evidence was taken and argument was heard on Plaintiffs' application for a temporary restraining order. A temporary restraining order was granted on June 21, 1974 and construction was enjoined as to those projects relating to a relocated U. S. Route 2, lying westerly of the Sleepers River interchange. The Court, however, denied the application as it pertained to construction of the interchange itself.

Commencing July 2, 1974, the District Court held a hearing on the merits of Plaintiffs' complaint, which hearing was concluded July 10, 1974.

At the hearing extensive testimony was taken on the question of preparation of the EIS. It was, for the most part, actually written by Arthur Aldrich, the Vermont Highway Department Location Engineer, who worked under the direct supervision of Arthur J. Goss, the Assistant Planning Engineer. Throughout the preparation of both the draft and final EIS, Mr. Aldrich was in almost daily consultation and communication with Gordon Hoxie, Engineering Coordinator of the Federal Highway Administration (FHWA) Vermont office. (op. p7). Mr. Hoxie, Mr. Kelley and other members of the FHWA staff also frequently reviewed and commented, often in writing, upon various aspects

of both the draft and the final EIS. Following its review of the EIS, the District Office of FHWA forwarded the EIS to the Office of Environment and Design at FHWA's regional office in Delmar, New York. There an interdisciplinary environmental task group operating under the direction of the Regional Director, Donato J. Altobelli, reviewed and commented upon the document. The task group included a civil engineer with a master's degree in hydraulics, specializing in water pollution, hydraulics, soil erosion and noise; an environmentalist specializing in environmental wild life, ecology and pollution; a lawyer specializing in environmental law; a civil engineer specializing in soils, materials and construction procedures; a real estate specialist involved with relocation and community impact; a landscape architect specializing in aesthetics, terrain and general water pollution; a civil engineer involved with air pollution; a civil engineer primarily concerned with compliance with regulations, paper work and the like, a structural engineer and an urban planner. (Op. p 9).

At the hearing David Smith, a socio-economist employed by the Vermont Highway Department gave extensive testimony. Mr. Smith was called by the State Defendants to testify about the economic conditions in the northeast portion of the State and, specifically, about the St. Johnsbury area. Mr. Smith stated that St. Johnsbury and the area sometimes referred to

as "The Northeast Kingdom" had for years been an economically depressed area with poor transportation systems. These poor economic conditions have resulted in young people migrating from this area to other parts of the state and to other states in order to gain employment. He further testified that the interstate construction project would be a boost to the economy of the area in the short run in the number of construction jobs made available to the local population and because of the supplies and materials which would be purchased in connection with the project. In addition, he stated that he anticipated economic growth in the area after the construction is completed.

The Defendant - Intervenor, Town of St. Johnsbury, called David T. Clark, the St. Johnsbury Municipal Manager, who testified about St. Johnsbury's traffic problems and its economic situation. Mr. Clark testified that the downtown area suffers from severe traffic congestion, particularly during the summer months and that St. Johnsbury desperately needs a by-pass. Mr. Clark described the route which would have to be followed to reach the interstate highway in the event the so-called Route 2 interchange is not constructed. He stated this was a very narrow, winding, steep road which at one point bisects St. Johnsbury Academy, which is the only secondary school in the community. In addition, Mr. Clark stated that St. Johnsbury experienced significant increases in traffic during the year that Expo 67 was featured in Montreal. He further testified that he

anticipated another substantial increase in traffic during the summer olympics which are scheduled for Montreal in 1976.

Mr. Clark then told of the difficulty which the Town of St. Johnsbury has had in attracting new industries to the Town. He stated that this was especially significant at this time because the Ralston Purina Corporation, which is one of the major employers in St. Johnsbury, is closing its plant and mill. Mr. Clark stated that one of the greatest problems in attracting industry has been a lack of adequate transportation facilities. Mr. Clark further stated that the Town had lost seventeen properties from its grand list of taxable real estate through condemnation in connection with the interchange which is the subject of this appeal, and that the Town had lost, in total, eighty properties from its grand list in connection with all interstate construction in St. Johnsbury and that the Town needed the economic benefits which would be realized from the completion of the interstate to off-set these losses.

Mr. William Stowe, a Selectman of the Town of St. Johnsbury, and Chairman of the Science Department at St. Johnsbury Academy, testified concerning the impact which construction of the Route 2 interchange would have upon the Sleepers River. Mr. Stowe testified, in substance, that while he agreed with Mr. Mold, the Director of the Fairbanks Museum, that the Sleepers River was important as an educational resource and as an outdoor laboratory, to the people of St.

Johnsbury, that the area proposed to be channelized was not unique. He further testified that the same geological characteristics of the Sleepers River could be observed and studied just upstream from the area of the proposed channelization. Mr. Stowe also expressed grave concern that without the Route 2 interchange, traffic would be increased on Main Street which bi-sects St. Johnsbury Academy.

The District Court found that in its opinion the equity sharply favored the Defendants and stated "for that reason, as our previously issued Judgment Order discloses, we find in their favor and decline to enjoin the construction of the Sleepers River interchange either preliminarily or permanently".

ARGUMENT

POINT I

The environmental impact statement prepared by the Vermont Highway Department with direction, guidance and assistance and daily communication with the Federal Highway Administration which was then reviewed, revised and adopted by the Federal Highway Administration complies with Section 102 (2) (C) of the National Environmental Policy Act of 1969, 42 U. S. C. Section 4332 (2) (C).

Section 102 (2) (C) of NEPA requires in the language of the statute that every Federal agency "include in every

recommendation or report on proposals for... major Federal actions significantly affecting the quality of the human environment, a detailed environmental impact statement by the responsible official...". We submit that this requirement of NEPA does not require FHWA to actually write the EIS itself. That under the language of the statute FHWA may delegate the responsibility for gathering the information and undertaking the research necessary to prepare an adequate EIS. We further say that it is quite appropriate and proper for FHWA to delegate this responsibility to the appropriate State Highway Department, to wit, the Vermont Highway Department.

The procedure followed by FHWA and the Vermont Highway Department in the instant case follows a procedure similar to that approved by five United States Circuit Courts in highway cases and in certain other cases in which NEPA required an EIS to be prepared. Iowa Citizens For Environmental Quality, Inc. v. Volpe, supra; Citizens' Environmental Council v. Volpe, 484 F. 2d 870 (10th Cir. 1973); Finish Allatoona's Interstate Right, Inc. v. Volpe, 484 F. 2d 638 (5th Cir. 1973); Life of the Land v. Brinegar, 485 F 2d 460 (9th Cir. 1973); Movement Against Destruction v. Volpe, ____ F. 2d ____ (4th Cir. March 19, 1974).

The instant case may be distinguished from Greene County Planning Board vs. F. P. C., 455 F. 2d (2d Cir.) Cert. denied, 409 U. S. 849 (1972), which Plaintiffs - Appellants

heavily rely upon. The Greene County case involved an EIS prepared by an applicant for a license before the Federal Power Commission ("FPC"). In the instant case the Vermont Highway Department is not an applicant for a license before FHWA as the power authority of the State of New York was an applicant for a license before the FPC.

In addition, the FHWA is basically a conduit through which funds for Federal aid highway projects are disbursed to State highway departments. FHWA does not have the planning capability to physically write an EIS. The planning and development agency with an adequate staff for this task exists within the Vermont Highway Department and we submit that they were the proper agency to physically write and prepare an EIS under the direction, guidance and specifications of FHWA pursuant to policies and procedures manual 90-1. In this case the District Court has made a specific finding that FHWA was in almost constant communication with Vermont Highway Department concerning preparation of the EIS, and specifically, that FHWA's input was included in the statement, that it helped prepare the responses to the comments received on the draft and that the regional office of the FHWA after a "searching review" added its own comments. (Op. Pl2). The trial court specifically distinguished the procedure used in this case from that which was criticized in Greene County (supra).

WYTERIS, ZUCCARO
AND WILLIS
ATTORNEYS AT LAW
JOHNSBURY, VERMONT

POINT II

The Sleepers River is not a navigable water within the meaning of 33 U. S. C. Section 1362 (7).

Plaintiffs - Appellants' claim that the Defendants' activities on the Sleepers River are in violation of the Federal Water Pollution Control Act Amendments of 1972, 33 U. S. C. Sections 1301, 1444. The appeal is based upon a contention that the Sleepers River is a navigable water as that term is defined by the Rivers and Harbors Act. We understand that the Federal Defendants are devoting a substantial portion of their brief to this question and, therefore, the Intervenor - Defendant Appellee will not dwell on this issue.

However, we think it is significant that the District Court made a specific finding below.

The District Court stated "the evidence clearly shows that the Sleepers River is not a navigable water..... The river must constitute a highway 'over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water' ID. at 563. Additionally, water may be deemed 'navigable' if 'it has been used or was suitable for use (as a highway over which commerce could be carried) in the past, It could be made suitable for use in the future by reasonable

improvements.' Rochester Gas & Electric Corporation v. Federal Power Commission, 344 F. 2d 594, 596 (2d Cir.), Cert. denied, 382 U. S. 832 (1965). But the Plaintiffs have failed to show that such use is, ever was, ever would have been, or ever would be appropriate to the Sleepers River."

POINT III

The granting of an injunction prohibiting construction of the Sleepers River interchange and the interstate in the area of the Sleepers River will cause serious harm and inconvenience to the Town of St. Johnsbury and to the general public.

Plaintiffs - Appellants appear to suggest in their brief that they are entitled to injunctive relief upon the showing of a violation of a Federal statute together with evidence that they will suffer irreparable harm. We submit that these two elements are not sufficient when there is additional evidence that other parties and the general public will suffer harm and inconvenience.

The District Court specifically found and the District Court specifically stated that to grant Plaintiffs the relief prayed for would result in a delay in the Town of St. Johnsbury realizing those manifest benefits which construction of the interstate would provide. The Court found these benefits to include a reduction in traffic congestion, a substantial number of construction jobs in a high unemployment area, and apparent, but less tangible economic benefits to an economically depressed area. (Op. P36). We submit that the Court below properly considered

these items of harm and inconvenience to the Town of St. Johnsbury and to its population in balancing the equities and in denying Plaintiffs the relief sought.

Chief Justice Burger, sitting as a Circuit Justice, in passing on applications requesting a stay of a preliminary injunction stated "our society and its governmental instrumentalities, having been less than alert to the needs of our environment for generations, have now taken protective steps. These developments, however praiseworthy, should not lead Courts to exercise equitable powers loosely or casually whenever a claim of 'environmental damage' is asserted.

The world must go on and new environmental legislation must be carefully meshed with more traditional patterns of Federal regulation. The decisional process for judges is one of balancing and it is often a most difficult task."

Aberdeen & Rockfish Railroad Co. et al., Applicants v.

Students Challenging Regulatory Agency Procedures (SCRAP)

et al. and Interstate Commerce Commission v. Students Challenging

Regulatory Agency Procedures (SCRAP) et al. 409 U. S. 1207

34 L. Ed. 2d, 93 S. Ct. 1 (1972).

Although Justice Burger upheld the lower court in denying the application for a stay, we think that the rule recited above is applicable in the instant case.

Nowhere does NEPA require or mandate the granting of injunctive relief for every violation of the act. We submit that in passing on such an application, it is right and proper for the trial Court to balance the equities as between the interest of each of the parties and as to the interest of the general public. The United States Supreme Court in Hecht Company v. Bowles stated "an appeal to the equity jurisdiction conferred on Federal District Courts is an appeal to the sound discretion which guides the determination of courts of equity." Hecht Company v. Chester Bowles 321 U. S. 321, 88 L Ed. 754, (1943).

In Hecht v. Bowles (supra) it was argued that the language of the statute involved did not permit the exercise of discretion in granting injunctive relief for violations of the Emergency Price Control Act, 56 STAT 23, C 26, 50 USCA Appx. Section 901, 925, 11 FCA Title 50, Appx. 25, (Section 201,205). The Court stated "it is, therefore, even more compelling to conclude that, if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain. Hence, we resolve the ambiguities of Section 205 (A) in favor of that interpretation which affords the full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect."

The District Court specifically found that the construction of the interchange is necessitated for adequate service of the existing roads and streets with I-91, whether or not U. S. Route 2 is eventually re-located in its entirety. (Op. P 35). The Court further found that as it weighed in balance what Plaintiffs hoped to accomplish by the pending action and the realities of the situation as the Court found them to be, that it must reach the conclusion that to enjoin the construction of the interchange at this stage so that the Defendants may effect a modification to the EIS to include the missing alternative and to allow the procedures prescribed by PPM 90-1 to be followed as to such revised EIS would be unwarranted and against good conscience. We believe that in view of the Court's specific finding in this area that Plaintiffs-Appellants must establish that the Court abused its discretion in arriving at this result. There is not a scintilla of evidence in the record to support such a claim.

It should be noted that the District Court found that the evidence in the case made downweight on the scales in favor of the Defendants and in the language of the Court "the equities sharply favor the Defendants". The District Court made this determination after listening to five and one half days of testimony and represents a finding which should only be upset upon a clear showing of an abuse of discretion by the District Judge.

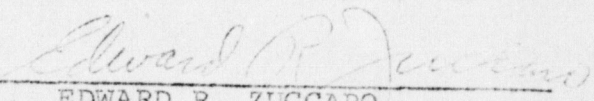
CONCLUSION

The EIS, prepared under the direction, guidance, supervision and specification of FHWA and later reviewed, revised and adopted by FHWA, meets all of the requirements of NEPA. In addition, the Sleepers River is not a navigable water within the meaning of the Rivers and Harbors Act. Finally, we say that the granting of an injunction prohibiting construction of the Sleepers River interchange and of the interstate in the area of the Sleepers River will cause serious harm and inconvenience to both the Intervenor, Town of St. Johnsbury, and to the general public. Therefore, the decision below the order of the District Court denying injunctive relief to the Plaintiffs should be affirmed.

Respectfully submitted,

WITTERS, ZUCCARO, WILLIS & LIUM

By


EDWARD R. ZUCCARO



WITTERS, ZUCCARO, WILLIS & LIUM

Attorneys at Law

101 EASTERN AVENUE
ST. JOHNSBURY, VERMONT 05819

EDWARD R. ZUCCARO
DAVID L. WILLIS
STEN LIUM

(802) 748-8958

HARRY W. WITTERS
OF COUNSEL

September 10, 1974

Hon. A. Daniel Fusaro
Clerk, U. S. Court of Appeals
for the Second Circuit
1702 U. S. Courthouse, Foley Square
New York, N. Y. 10007

re: Vermont Natural Resources Council,
Inc., et al v. Brinegar, et al -
Appeal from District of Vermont
Civil No. 74-149

Dear Sir:

Enclosed please find twenty-five copies of the
Brief of the Town of St. Johnsbury, Intervenor - Defendant-
Appellee in the above-captioned matter. Service has been
made upon Harvey C. Carter, Esquire, Robert S. Schwartz, Esquire
and William Gray, Esquire.

Sincerely yours,

WITTERS, ZUCCARO, WILLIS & LIUM

By Edward R. Zuccaro
EDWARD R. ZUCCARO

ERZ/cvm

cc: Harvey C. Carter, Esquire
Robert S. Schwartz, Esquire
William Gray, Esquire